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October 18, 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: **Ex Parte Communication**
MM Docket No. 92-259

**Broadcast Signal Carriage Issues in the
Implementation of the Cable Television Consumer
Protection and Competition Act of 1992**

Dear Mr. Caton:

I am writing on behalf of NATIONAL DATACAST, INC.,
("Datacast"), a for-profit subsidiary of PBS
Enterprises, Inc., which is in turn a for-profit
subsidiary of the Public Broadcasting Service ("PBS"),
in support of late comments filed in this proceeding on
September 13, 1993, by StarSight Telecast, Inc.
("StarSight").

The issue raised by StarSight is under what
circumstances material transmitted during the vertical
blanking interval ("VBI") of a television station
should be deemed "program-related," such that if the
television signal is required by regulation to be
carried by cable systems, the VBI signal must also be

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Arent Fox

William F. Caton, Acting Secretary
October 18, 1993
Page 2

carried if technically feasible.^{1/} The Commission adopted the copyright test as stated in WGN Continental Broadcasting Co. v. United Video, 693 F.2d 622 (7th Cir. 1982), to determine whether VBI material is program-related. StarSight supported the Petition for Reconsideration filed by the National Association of Broadcasters ("NAB"), which urged the Commission to reconsider its decision to rely on the WGN test. Datacast agrees with StarSight that in determining whether VBI material is program-related, the controlling factor should be the broadcaster's intent that the VBI material be related to main channel programming, and it is inappropriate to apply the element of WGN requiring that the VBI and main program channels be viewed simultaneously.^{2/}

The decision as to whether material in the VBI is intended to be an integral part of the primary program is a content-based determination that can be made only by the broadcaster itself, not by the cable operator or a district court judge. This principle is critical in

^{1/} See Sections 614(B)(3)(A) and 615(g)(1) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), and Sections 76.62(e) and (f) of the Commission's Rules and Regulations.

^{2/} It should be noted that the Act itself does not specify the test to be used to determine whether VBI material is program-related.

Arent Fox

William F. Caton, Acting Secretary
October 18, 1993
Page 3

the context of public television, where at least some of the material in the VBI will be related to programming aired on the public television station, but not necessarily to the program being broadcast at the same time the VBI material is transmitted. For example, lesson plans and other educational data may be delivered on the VBI ahead of time, to give teachers a preview of an educational program that will be broadcast the following day. Making this material available in advance enhances its usefulness to teachers, because it gives them time to review the material and be better prepared to instruct their students at or before the time the students view the related program.^{3/}

Congressional intent also favors this interpretation. In passing the Act, Congress clearly demonstrated a special interest in assuring access by viewers to public television stations:

The legislation seeks to preserve and promote public access to the wide variety of educational, informational, cultural and instructional programming available on local public television stations serving communities throughout the United

^{3/} Even if the VBI material relates to a program to be broadcast on another television station, it is still program-related, still has value when delivered in advance of the program, and still merits carriage under the "program-related" test of the Act.

Arent Fox

William F. Caton, Acting Secretary
October 18, 1993
Page 4

States...Congress and the American taxpayer have given public television unprecedented support over the last three decades, and public television stations have developed a wide variety of distinctive, award-winning program services. The government has a compelling interest in ensuring that these services remain fully accessible to the widest possible audience without regard to the technology used to deliver these educational and informational services.

H.R. Rep. No. 102-628, 102nd Cong., 2d Sess., 68-69 (1992). The material carried on the VBI of PBS stations is an essential part of the educational and informational programming of PBS and other public and commercial television stations. If this material is allowed to be stripped by cable operators, both educators and viewers will be deprived of important services which enhance the value of television programming.

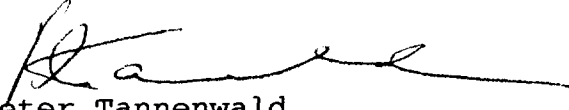
Therefore, PBS supports StarSight's request that the Commission grant the NAB's Petition for Reconsideration to clarify that VBI-delivered technologies delivered by StarSight and similar entities be treated as program-related if so deemed by the broadcaster, regardless of whether they are related

Arent Fox

William F. Caton, Acting Secretary
October 18, 1993
Page 5

to the program that is simultaneously broadcast on the
main channel.

Respectfully submitted,



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